

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 864 of 1990

For Approval and Signature:

Hon'ble MR.JUSTICE B.C.PATEL and  
MR.JUSTICE A.K.TRIVEDI

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1. Whether Reporters of Local Papers may be allowed : NO  
to see the judgements?
  2. To be referred to the Reporter or not? : NO
  3. Whether Their Lordships wish to see the fair copy : NO  
of the judgement?
  4. Whether this case involves a substantial question : NO  
of law as to the interpretation of the Constitution  
of India, 1950 of any Order made thereunder?
  5. Whether it is to be circulated to the Civil Judge? : NO

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DILIPSINH N VAGHELA

Versus

STATE OF GUJ  
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Appearance:

MR SHALIN N MEHTA for Petitioners  
Mr. K.P. Raval, ld. A.P.P. for Respondent No. 1  
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CORAM : MR.JUSTICE B.C.PATEL and  
MR.JUSTICE A.K.TRIVEDI

Date of decision: 11/05/1999

ORAL JUDGEMENT( Per B.C. Patel,J.)

The present appeal is preferred by the original  
accused nos.1 and 2 of Sessions Case no.56/90 who were  
convicted by the learned Addl. Sessions Judge, Ahmedabad  
Rural on 28-9-1990. Alongwith the appellant one  
Mangaldas Ganpatbhai Shukla (accused no.3) was also

tried, however, the trial Court acquitted the accused no.3.

2. The maximum sentence awarded to the appellant no.1 is of 10 years. So far as the appellant no.2 is concerned, the maximum sentence awarded is one year. The accused no.2 was released on bail. We take a serious note of the fact that though the accused no.1 was tried and convicted by an order dated 28-9-1990 and the appeal was admitted on 12-11-1990, the matter could not be disposed of within a reasonable period. It is also required to be noted that when we called out the matter, soon after the business was entrusted to us, the learned Advocates who filed their joint appearance did not bother to remain present before the Court. We waited for some time. Our order dated 21-4-1999 clearly points out that the matter was on the board since long. The names of the learned Advocates were called out but have not appeared in the matter, and therefore the Court was constrained to appoint Advocate Mr. S.N. Mehta as amicus curie to assist the Court.

3. After going through the record we inquired from the Public Prosecutor whether the accused no.1 is still in the prison or not and we were told that he has been already released on 1-7-1997. If the conviction is confirmed on appreciation of evidence, the matter may be different however if the conviction is set aside the accused will have an impression that he has been wrongly detained in jail. Registry must see that the appeals are heard as early as possible and for that purpose, matters must be placed before the Court. Office must look into the papers for finding out the date of conviction and whether accused-appellant is released on bail or not and if not since when he is in jail. In any case, if the accused appellant has completed half of the sentence except in the matters of life imprisonment, a separate Board should be listed before the Court. Office to strictly follow the procedure for listing the matters before the Court.

4. Tulsibhai Haribhai Chauhan, PW 5 on 8-9-1989 lodged a complaint which is on record at Exh.42 inter alia alleging that on 7-9-1989 at about 7.00 p.m. he sent his daughter, the prosecutrix, with a sum of Rs.3000/-for the purpose of making payment to one Bhavani Electronics towards outstanding amount in connection with purchase of a T.V.. She did not return till late and therefore Tulsibhai asked his son-Jitubhai to make inquiry at the shop and thereupon it was learnt that she had not made payment to the shopkeeper. While making

inquiry one Nitin who had a panshop in the vicinity informed that prosecutrix has been taken away by one Dilipsing Darbar of Kolvada. Despite making inquiries in Sector no.24, Gandhinagar and near about areas there was no fruitful result.

5. In the information Exh.42 the father of the prosecutrix has further stated that earlier the accused Dilipsinh had enticed the prosecutrix and took her away with an intention to satisfy his sexual lust and/or for marriage. She was subsequently found from Gandhinagar and when action was sought to be taken on 8-7-1989, the accused in the presence of two Panchas executed a writing that he will not repeat the crime. It was learnt at that point of time that accused was married. The accused Dilipsinh was not doing any work and was a headstrong person. In the F.I.R. it was specifically stated that the accused took away the prosecutrix knowing fully well that she was minor and as such he removed the prosecutrix from the guardianship of the father for the purpose of sexual intercourse and/or for marriage. It is further pointed out that for the aforesaid purpose, prosecutrix was kidnapped with a sum of Rs.3000/. The police registered the complaint at about 21.45 hrs.on 8-9-1989.

6. In the evidence Tulsibhai, PW 5, has stated that information about kidnapping was derived from one Nitin Bhavsar by his son Jitu. He has positively stated that they learnt that she was kept in a double decker house of Housing Board situated in Sector no.24.

7. As per the prosecution version, on 9-9-1989, Police Sub Inspector of Gandhinagar Police Station was approached by the prosecutrix with an application Exh.46 inter alia stating that before about two months she got married with Vaghela Dilipsinh the accused no.1 and that it was a civil marriage. It is thereafter on 5-7-1989 she went to reside with her father. On 8-7-1989 her father and brothers called Dilipsinh and both were threatened and signatures were obtained on divorce papers. Thereafter, she was residing with her father but since about two months her parents, her brothers and sister-in-laws were torturing her and before about two days i.e. on Thursday at about 9.00 p.m. she was driven out by her parents and brother Jitu. Since two days she was searching the accused Dilipsinh with whom she was married but as he was not traced she has approached the police. She requested in the application that she is not willing to go to her parents house. She further stated that on account of love she married Dilipsinh and she wanted to stay with him.

8. It is thereafter on 17-10-1989, prosecutrix submitted an application to the Inspector of Police inter alia stating that the accused no.1 Dilipsinh accompanied her on 7-9-1989. Even earlier from 29-6-1989 to 1-7-1989 she was kept in his custody. From 7-9-1989 to 9-9-1989 one Satish Valand-the accused no.2 and the accused no.1-Dilipsinh kept her in confinement in a double decker room no.241 situated in Sector no.24. Dilipsinh while going out of the house asked Satish-the accused no.2 to keep a watch on the prosecutrix and thereafter the accused no.2 by pointing out a knife threatened that if she runs away she would be killed by means of a knife. She further stated that on both the occasions-the accused no.1 Dilip had sexual intercourse with her. For a period of about one month he could not be arrested. She further stated that she could not state these facts before the police on 9-9-1989 as she was afraid of the accused no.1-Dilipsinh as he was free and he had administered threats, but since he was in jail she was not afraid of anyone and she stated that her statement should be recorded immediately.

9. It appears from the record that it is thereafter the Police Officer has recorded her statement for the first time. After the investigation, police filed chargesheet against the present accused nos.1 and 2 and one Mangaldas Shukla, after completion of the investigation. The Judicial Magistrate, First Class, committed the accused to the Court of Sessions. The learned Addl. Sessions Judge framed charge vide Exh.19 on 8th August, 1990. The accused no.1 was charged for offences punishable under Secs.363,365, 366, 376, and 506(2) of the Indian Penal Code. The accused no.2 was charged for offences punishable under Secs.363, 365, 506 and also the aforesaid offences read with Sec.114 of the Indian Penal Code. The accused nos.1 and 2 were also charged for offences punishable under Secs.468 and 114 of the Indian Penal Code. The accused no.1 was also charged for offences punishable under Secs. 463, 465, 466, 467, 468, 469 and 471 of the Indian Penal Code. The accused no.3 was charged for offences punishable under Secs.465, 466, 467, 468, 469 and 471 read with Section 114 of the Indian Penal Code. The accused pleaded not guilty to the charge and contended that they are entirely innocent.

10. The trial Court on appreciation of evidence both oral as well as documentary, hearing the submission urged at the Bar and considering the statement of the accused recorded under Sec.313 of the Criminal Procedure Code

acquitted the original accused no.3 and convicted the accused nos.1 and 2 for the following offences. The accused no.1 was convicted for offences punishable under Sec.376, 363, 365, 506(2) 465, 466, 467, 468, 469 and 471 of the Indian Penal Code and was sentenced to suffer R.I. for the term of 10 years and to pay a fine of Rs.500/-, in default of payment of fine, S.I. for six months. For other offences the accused no.1 was sentenced to undergo different periods of imprisonment and was also ordered to pay amount of fine. All the sentences were ordered to run concurrently. So far as the accused no.2 is concerned, the ld. Addl. Sessions Judge, held him guilty for offences punishable under Secs., 368, 506(2) of the Indian Penal Code and also Secs.363 and 366 read with Sec.114 of the Indian Penal Code and was sentenced to suffer R.I. for one year and fine of Rs.200/-, in default of payment of fine, S.I. for two months. He was also sentenced to undergo imprisonment for different periods and was also ordered to pay fine for other offences. All the substantive sentences were ordered to run concurrently. It is against this order the appeal is preferred and as indicated earlier, Mr. S. N. Mehta, learned Advocate was appointed to assist the Court as amicus curie.

11. Mr. Mehta learned Advocate submitted that, in the instant case, evidence of prosecutrix is unreliable and in view of several contradictions and omissions which are proved her evidence cannot be accepted. He further submitted that though she was before the police on 9th September, 1989 she did not convey anything to the Police Officer. She was in the custody of her father after 10th September and for the reasons best known to the Investigating Officer, her statement was recorded for the first time after 17-10-1989. If the prosecutrix was available and when she was under the protection of her parents there was no earthly reason for the Investigating Officer not to record her statement immediately after 9-9-1989. He further submitted that the incident is alleged to have taken place in a shopping centre at about 7.00 p.m. and that she had all the opportunities to raise a cry or shout but instead of raising shouts for protecting herself she went quietly with accused no.1. If Nitin Bhavsar witnessed the incident there was no earthly reason for not examining the said witness. He pointed out that PW 6 - one Vijay the landlord of the premises occupied by the accused was examined by the prosecution but for the reasons best known to the prosecution, the prosecutrix was not identified as a lady who was with the accused at that time. He further submitted that looking to the medical evidence, it is

clear that there was no evidence showing recent sexual intercourse and that she was in the habit of having sexual intercourse. He further submitted that even before the Doctor she has stated that somebody assaulted her sexually. He has pointed out number of infirmities which we will discuss hereinafter.

12. He further submitted that the charge is defective. The accused nos.1 and 2 could not have been tried with the accused no.3. As far as the first incident is concerned there is no reference of the presence of the accused no.2. The accused no.3 has no connection with the later incident and therefore he could not have been tried with the accused nos.1 and 2. Mr. Mehta submitted that the trial Court has committed grave error by conducting a joint trial in violation of the provisions of law and the same has caused serious prejudice to the defence of appellants and therefore the appellants-accused be acquitted on that ground alone.

13. Mr. Raval, learned Addl. P.P. submitted that considering the fact that the prosecutrix was minor it is not open for the accused to say that he has committed no offence. Before removing a minor from the custody of the guardian, it was the duty of the accused to obtain the consent of the guardian. The moment the minor is removed from the custody of the guardian, the offence is committed. He further submitted that in the instant case she was confined in a house where the accused no.1 as well as the accused no.2 threatened her by pointing a knife at her and looking to her age she was not able to resist or protect herself and the accused took disadvantage of the circumstances created by them. He further submitted that earlier the accused no.1 enticed the prosecutrix and later on executed a writing. He assured that he will not repeat such crime again in future and therefore he was allowed to go. He further submitted that the signature of the prosecutrix was obtained on a blank paper (marriage form). It was tendered before the Registrar of marriages for the purpose of showing to the world at large that the accused and the prosecutrix are husband and wife. The accused no.3 signed the said document knowing fully well that no marriage ceremony has been performed and according to the Public Prosecutor it was the design of the accused no.1 to anyhow secure the prosecutrix. The prosecution has led sufficient evidence and therefore the accused are rightly held guilty and it requires no interference.

14. The prosecutrix in her deposition in chief has stated that she was born on 15-2-1972. She took primary

education in a primary school situated in Sector no.23 at Gandhinagar. She completed her studies upto 10th Std. thereafter she studied in middle school situated in Sector no.29. At the time of incident she was about 17 1/2 years old. To be precise, 17 years, 6 months and 22 days. On 7-9-1989 she went to a shop situated in Shopping Centre at the instance of her father for making payment of Rs.3000. According to her, in the shopping centre, accused no.1 met her and under threat and coercion asked her to accompany him. She further stated that the accused no.1 pointed out a knife while administering threats and therefore she was afraid. This aspect is not stated before the police. She further stated that she was taken to Sector no.24 in a rickshaw to room no.241 which is referred to as a double-decker room. The accused no.1 unlocked the room and took her inside. She started crying and stated to the accused no.1 that he has brought her against her will. She would like to go to her father's house but the accused no.1 threatened that she should not go to any other place from the place where she is kept. It appears that this part of the story is also not stated before the police. She further came out with the version that at about 10.00 to 10.30 p.m. the accused no.1 had sexual intercourse with her against her will. At the relevant time she had put on underwear, pyjama and kurta. She has narrated how the accused no.1 committed sexual intercourse. She stated that she opposed. At about three times, the accused was pushed. The entire story of the manner in which the accused committed sexual intercourse and the clothes put on by her or that the accused no.1 committed sexual intercourse against her will is not stated before the police. She stated that she was threatened thereafter and was kept at the same place till after noon of 9-9-1989.

15. In paragraph 4 of the evidence she stated that at about 9.00 a.m. on 8-9-1989, the accused no.2 who was the friend of the accused no.1 came. The accused no.2 was told by the accused no.1 that he has kidnapped this girl (prosecutrix). It may be noted that before the police she has not stated that; "he has kidnapped the girl. For some reason, the accused no.1 went outside for some time asking the accused no.2 to keep a watch on the prosecutrix. The accused no.2 was conveyed by the prosecutrix that she has been forcefully and against her will confined and she had a desire to go to her father and she should be allowed to go. He pointed out a knife and threatened that if any attempt is made to go out she will be killed. The accused no.2 left on arrival of the accused no.1. According to her say, the accused no.2 used to bring tiffin. She has not stated before the

police that the accused no.2 used to bring tiffin or that he administered threats. She further stated that on 8-9-1989 at about 11.00 p.m., the accused no.1 raped her. She opposed at that time. She further stated that the accused used to administer threats to kill her and therefore she could not resist and for all the three days, the accused no.1 did not allow her to go out. She has not stated before the police that for all the three days the accused no.1 did not allow her to go out. On the third day i.e. 9-9-1989 at about 11.00 a.m., the accused no.1 obtained the signature of the prosecutrix on a writing which was not read by her. She signed because of the threats administered. The writing has been produced at Mark 23/6. She stated that thereafter the accused no.1 executed the writing in her presence and she has identified and stated that the handwritings are of the accused, and therefore, the document has been given mark (Exh.46). The accused no.1 asked to take said application to the police station but she refused. Thereafter, the accused no.1 threatened and took her upto the police station and thereafter application was given to the police. Before the police, she has not stated that the accused no.1 has asked her to go with the application to the police station and she refused.

16. In paragraph 7 of her evidence she has referred to the earlier incident which took place on 29-6-1989. According to her say at about 7.00 p.m. her mother asked her to bring vegetables from the shopping centre just behind the house. When she went to the shopping centre for vegetables it was raining and she was waiting near one shop which was closed. The accused no.1 came and stated that she should accompany him, otherwise she would be killed. Thereafter, she was taken in a rickshaw to a place just behind the factory known as Devi Electronics situated in GIDC Estate. She started crying and stated that why she was brought to that place and she should be taken to her house. It is thereafter she has explained how the accused no.1 committed sexual intercourse and as there was bleeding, the accused no.1 with his handkerchief cleaned the private part of the prosecutrix. Before the police she has not stated about giving push to her or taking out her clothes and with regard to sexual intercourse. She has also not stated before the police that the accused no.1 with the handkerchief which was with him cleaned the private part as there was bleeding. She came out with a version that it was a lonely place and there was no movement of person. She was kept there during the night and in the morning she was taken to village Kolavada. The accused no.1 brought clothes for her. She was threatened not to move from that place.



She further stated that from there the accused no.1 took her to the GIDC from where a rickshaw was hired and for the purpose of marriage she was taken to the Court at Gheekanta in Ahmedabad. Near the canteen in the Court the accused no.1 asked her to marry him, but she refused. She has stated that again the accused no.1 brought her to the place just behind Devi Electronics and during night hours he had sexual intercourse twice. She has further stated that the accused used to bring snacks from handcarts. Sometimes, the accused no.2 used to bring tiffin. According to her say, from 29-6-89 to 2-7-89 she was kept just behind Devi Electronics. On 1-7-1989 the accused obtained her signature in one form under compulsion. She was shown the original register from the office of the Registrar of Marriages. She pointed out a form which was signed by her which was given Mark (Exh.32). She specifically stated that she had signed the form but the date is not in her handwriting. According to her version when the accused no.1 gave the form to sign it was blank and under compulsion her signature was taken. She stated that the accused no.1 stated that the prosecutrix was required to marry and with compulsion she signed. She came out with the version that the accused no.1 married her without performing any ceremony. She stated that she knew about "Saptapadi" and the ceremony to be followed under the Hindu Shastras. She stated that no such ceremony was performed and no priest for performing the marriage was called. In cross-examination she stated that she was with the accused no.1 for the first time on 29-6-1989 and subsequently i.e. after 9-9-1989 she came to know that the accused no.1 was a married person. She denied the suggestion that she knew the accused no.1 since about six to seven years. She also denied the suggestion that she had love and affection towards the accused no.1 and she used to move with the accused no.1. She has denied the suggestion that the accused no.1 used to write love letters to her. It may be noted that if such letters were written to the accused by her, it was for the accused to place before the Court and should have been shown to the witness.

17. Certain omissions are brought out in the cross-examination which we have pointed out. She has referred to the presence of one Vijaybhai who was the owner of the house where she was kept. She stated that when the accused no.1 was questioned by said Vijaybhai who was the owner of the house where she was kept. She stated that when the accused no.1 was questioned by said Vijaybhai, the accused no.1 stated that the lady (prosecutrix) is his wife. She was threatened by the

accused no.1 that if said Vijaybhai puts any question she should not say anything. There was no chance to meet Vijaybhai and therefore there was no question of talking to him. She was questioned as to why despite movement of the people in the place where she was kept she had not raised any cry to which she answered that she did not raise any cry because the accused no.1 did not open the doors or the windows. Even while going to the bathroom the accused no.1 used to accompany her. Even on the next day when she went to answer the call of nature the accused no.1 was standing outside and hence she did not raise any shout. She has denied the suggestion that application Exh.46 was submitted by her to the police as her parents were torturing her. The accused no.1 was just standing outside the police station. She stated that she did not disclose the truth before the police because she was threatened by the accused that her parents were outside and she was in the police station (the threats were administered indicating that if anything contrary to what was stated is done, he would cause hurt to her parents). She stated that her father filed a complaint. She was kept in the police station as she was to be examined by the Medical Officer. The Doctor examined her at about 3.00 p.m. on 10-9-1989. She did not convey to the police that the accused no.1 accompanied her upto the police station. She stated that she conveyed to the police that the accused no.1 had sexual intercourse, but when Medical Officer examined her and questioned her she did not say that the accused no.1 had sexual intercourse with her. With regard to the incident which took place on 29-6-1989 in cross-examination she has stated that on account of rain there was no movement of public. Shops were open. In reply to a question as to why she did not raise shouts while being taken in a rickshaw, she stated that the accused no.1 administered threats not to raise any shouts. She pointed out that she was taken in a rickshaw in a lonely place. Devi Electronics situated in GIDC Estate was a working unit. She stated so because she used to hear the noise. She pointed out that there was grass behind Devi Electronics and the area was almost like a jungle. She was cross-examined about taking her to Kolavada on 29-6-1989. On a question being put to her as to why she had not run away when the accused no.1 went to bring clothes for her, she stated that it was dark, and therefore, she did not try to run away. For not raising cry when she was in rickshaw, she stated that on account of the threats administered by the accused no.1 she did not raise any cry. She has stated that when she was taken to the Court in Ahmedabad near canteen they met a person wearing a black coat to whom the accused no.1

stated that they wanted to marry. When she was questioned she refused, and thereafter, said Advocate left the place. She has admitted that when the Advocate met her she did not state before him that the accused had accompanied her. In the canteen there were several other lawyers but she had not stated to any lawyer as she was under threats of the accused no.1. She did not see any policeman in the Court.

17. In paragraph 23 of her evidence she has stated that on 2-7-1989 at about 9.15 a.m. the accused no.1 took her to a garden situated in Sector no.28. When they went to the garden there was no movement of persons. When they were in the garden her brothers came there and seeing them, the accused no.1 ran away. Thereafter, her brothers took her to the house. We are not giving any importance to the question put about the fact as to who went to the school for admitting her to the school and giving the date of birth. It is a fact that at the time of admission in the school her birth date was recorded. There was a certificate of Talati and after reading the evidence, we are of the view that the prosecution has proved beyond reasonable doubt that the prosecutrix was born on 15-2-1972.

18. Learned Advocate Mr. Mehta submitted that the prosecutrix has improved a lot upon her version. He submitted that though she was before the police as admitted by her she did not complain to the police. In the police station there was no question of fear due to threats. He submitted that when she was in the police station she could have pointed out that the accused no.1 was standing outside and he could have been arrested for the offence which he has committed. It is further submitted that though the complaint was received on the previous day from her father, yet the police has not bothered to take any action. She was neither taken to the Medical Officer nor her statement was recorded by the police. The statement of witnesses should be recorded at the earliest opportunity available to the Police Officer Investigating a crime. He submitted that in the instant case, though she was before the police on 9-9-1989 her statement was recorded for the first time on 15-10-1989. There is no explanation from the police as to why her statement was not recorded earlier. That despite the delay and in view of the omissions in evidence Mr. Mehta submitted that evidence of prosecutrix is unreliable and cannot be accepted so as to hold that the prosecution has proved that the accused no.1 has committed the alleged crime beyond reasonable doubt. According to him, there were several opportunities for the prosecutrix to call

for help or to run away. She has neither bothered to raise her voice at the shopping centre nor in the presence of Vijaybhai. Number of opportunities were there to convey the information and to ask for help but she had stated that on account of threats administered she did not convey to anyone.

19. Mr. Mehta submitted that this is the very prosecutrix who is alleged to have been kidnapped by the accused no.1 just before the period of about three months. Her story about kidnapping and taking her at a place behind running factory where there was grass should not be accepted. That there was sufficient opportunity for her to run away from that place. There was sufficient opportunity to disclose the facts to the lawyers in Court compound where she was taken. Her say that there was not a single policeman in the Court also cannot be accepted. He further submitted that this is a case where a girl aged about more than 17 1/2 years has left the shelter of her guardian to join the accused no.1.

20. There is no explanation about the sum of Rs.3000/-which were given to her by her father. In her evidence, she has nowhere stated that the accused took away the amount or that he used the said amount without her permission. Mr. Mehta further submitted that one Nitin Bhavsar having a Pan-Bidi shop is alleged to have seen the accused with the prosecutrix, yet he is not examined by the prosecution. He further submitted that Vijaybhai the owner of the premises who is alleged to have seen the accused no.1 at the house where the prosecutrix was kept has not stated in his evidence that the accused no.1 was with the prosecutrix. He submitted that the accused no.1 being a married person, he might be in the company of his wife. The prosecution, if wanted to establish that the accused no.1 was with the prosecutrix, it was the duty of the prosecution to show the girl to the witness to assert that the same girl was with the accused no.1. Mr. Mehta further submitted that from the prosecution evidence, it is very clear that her father on 8-9-1989 in a complaint before the police has pointed out that the accused no.1 kidnapped the prosecutrix with the sum of Rs.3000/-. Yet, there is no investigation on this point. In the evidence, complainant has come out with the case that on the date when prosecutrix was kidnapped, he came to know that the accused no.1 has kept his daughter in a double-decker room situated in Housing Board in Sector no.24. If this was the information available to the prosecution why the complaint was not filed immediately and why the

assistance of the police was not sought for. The complainant has come out with the version that even on previous occasion she was kept in Sector no.24.

21. Mr. Mehta further submitted that in the instant case, even on earlier occasion when the accused is alleged to have committed an offence no complaint whatsoever was filed. It is difficult to believe, according to him, that the accused would take the girl to Gandhinagar where her parents were residing. There was no earthly reason for her brothers to be in the garden at about 9.00 a.m.. He submitted that the story is highly improbable that the accused would be there with the girl and brothers would visit the garden. He further submitted that it was the duty of the prosecution to take the specimen handwritings of the accused no.1 and to send the same to the expert to see that the form is filled in by the accused no.1. That in all probability, the girl must have left the house of her parents and must have joined the accused no.1 of her own. He submitted that in the absence of evidence of Nitin Bhavsar, the evidence of prosecutrix, with regard to "taking" cannot be accepted. He submitted that the medical evidence is also required to be considered at this stage. What was the reason for the prosecution for not getting her examined at the earliest by the Doctor? No explanation has been placed by the Police Officer on record.

22. He submitted that from the evidence of Dr. K.M. Thakkar, PW 4 it clearly appears that there were no marks of recent sexual intercourse. There were no marks of injury on her private parts. On internal examination, the Doctor found that there was rupture of hymen and there was no swelling. There were no marks of injury. According to the Medical Officer, it was not possible to say that there was recent sexual intercourse or not. The Medical Officer specifically stated that if there is sexual intercourse by force then the part of the hymen would be reddish. There may be rupture of hymen, as stated above, but he has stated that on account of such sexual intercourse if the hymen has become reddish the same would remain for 24 to 48 hrs. There would be swelling. In the cross-examination, the Doctor has stated that looking to the age and the structure of the girl, she was capable of defending herself. According to the Medical Officer she was in the habit of having sexual intercourse. In view of the Medical evidence, Mr. Mehta submitted that the absence of recent sexual intercourse clearly reveals that there was no sexual intercourse as alleged by the prosecutrix. He submitted that considering the contradictions which are found in the

evidence it is clear that the evidence of prosecution so far as it relates to the sexual intercourse is not reliable. Mr. Mehta submitted that one has to bear in mind that a girl who was subjected to sexual intercourse when asked by a Doctor would definitely convey the name of the assailant as she was in free state of mind at that stage. It is required to be noted that considering the contradictions which are brought on record, it is clear that her story about sexual intercourse is highly improbable. The clothes put on by the prosecutrix were forwarded to the Chemical Analyst for his opinion. Swab was taken from the vagina for the purpose of laboratory testing. The Medical Officer did not find spermatozoa in the private parts of the prosecutrix. The expert has positively stated vide his report Exh.59 that there was no semen on clothes of the victim. According to Mr. Mehta, the evidence of the prosecutrix should be rejected in toto for convicting the accused.

23. Mr. Mehta's submission appears to be very attractive. One thing is certain that she was minor i.e. under the age of 18. No doubt the statement of the girl is recorded after the delay of about forty days. The prosecution has come out with the explanation that she was threatened to such an extent that till the accused was free she was not willing to give statement and it is only after arrest of the accused that she submitted an application to the police to record her statement. It is the case of a girl who was not a college going student. There must be some evidence to indicate that she was able to take decision of her own. Under the circumstances, even if it is held that version with regard to rape by the accused no.1 being improbable and contrary to the medical evidence, it cannot absolve the accused no.1 from the charge in respect to offences made punishable u/ss. 363 and 366 of the IPC.

24. It may be noted that the prosecution has proved the entry of the birth date of the prosecutrix as of 15-2-1972 through extract from G.R. of the school vide Exh.35 and the School Leaving Certificate Exh.36. That the said documentary evidence is proved through the evidence of PW 8- M.M. Valand and PW 3 M.D. Thakar. Thus, the prosecution has established beyond reasonable doubt the fact that on the date of first incident i.e. 29-6-1989 as well as second incident i.e. 7-9-1989, the prosecutrix was minor and was under the care and custody of her father-PW 5 Tulsibhai. Furthermore, the prosecution has also proved the writing Exh.41 dated 8-9-1989; executed by the accused no.1; through the evidence of PW 9-Navanitlal Shivashankar the attesting

witness to the said writing. That the accused no.1 has admitted the fact that he had compelled the prosecutrix under threat to accompany him on 29-6-1989 and has kept her in his custody by force till 2-9-1989. That the accused no.1 and his father both, executed the said writing Exh.41 and apologised for the wrongs committed i.e regarding the factum of accused no.1 having taken her on 29-6-'89; which amounts to removal of the minor from the custody of her guardian without the consent of the guardian. That in the facts and circumstances of the present case, the accused no.1 has taken the prosecutrix with the intention of subjecting her to sexual intercourse and/or marrying her. In view of the fact that the girl under age of 18 was taken out of the keeping of the lawful guardianship of minor amounts to kidnapping. Hence, the offence punishable u/s.363 and 366, IPC stand established beyond reasonable doubt. So far as accused no.1 is concerned, consent of a minor is no consent. Hence, we hold that the appellant-the accused no.1 is proved to be guilty for the offences made punishable u/ss.363 and 366 of the IPC, on the evidence produced by the prosecution even if benefit of doubt is given to the appellant-the accused no.1 for an offence punishable u/s.376, IPC.

25. As regards the charge for the offences made punishable u/s.465, 466, 467, 468, 469 and 471 of the IPC, the trial Court has discussed the relevant evidence against appellant-the accused no.1 vide paras 34 to 37 of the judgment Exh.69. The prosecution has produced the original memorandum through PW 2 Kiritkumar Agnihotri and proved the contents as recorded in the public record vide Exh.32. The prosecutrix PW 7 has identified her signature on the same and has deposed vide Exh.45 para 7 that the accused no.1 has obtained her signature on the blank form by giving threat. The trial Court has accepted that part of the evidence of the prosecutrix as the same is corroborated by the extra-judicial confession made by the accused no.1 in writing Exh.41 which is duly proved by the prosecution through attesting witnesses. As the evidence of prosecutrix is accepted, the order of conviction of the accused no.1 for the said offences are required to be confirmed.

26. It is significant to note that the trial Court has framed points nos.9 and 10 for determination to give findings in respect to charges levelled against appellant-the accused no.2. That vide para 37 of the judgment the trial Court has recorded the affirmative findings for both the points. However, the reasons assigned by the trial Court is devoid of any logical

discussion of evidence and consist of assertions only. It is noteworthy that even according to prosecution version appellant-the accused no.2 was not present when the prosecutrix was removed by the accused no.1. The only evidence against appellant-the accused no.2 is of oral version deposed by the prosecutrix-PW 9 vide Exh.45 to the effect that when she was kept at room no.241 of Sector no.24, Gandhinagar, by the accused no.1; on 7-9-1989, the accused no.2 came to the said premises at about 9.00 a.m. of 8-9-1989 and had kept a watch on her at the instance of the accused no.1. That despite her request the accused no.2 had threatened her by showing knife and had confined her in the room till the accused no.1 returned. That as discussed hereinabove, the version deposed by the prosecutrix does not inspire confidence on account of improbabilities and incredibility. The evidence against accused no.2 cannot be said to be satisfactory so as to hold him guilty. That the order of conviction of appellant-the accused no.2 is concerned is unsustainable in the facts and circumstances of the case as apparent from record; and as such it is required to be quashed and set aside.

27. Shri S.N. Mehta, learned Advocate appointed by the Court for the appellants, could not dispute the proposition that in view of provisions contained in Secs.464 and 465 of Cr.P.C., unless it is shown that, failure of justice in fact has occasioned, any and every irregularity or infraction of a procedural provision, cannot constitute a ground for interference by the superior Court. In the instant case, neither the original accused no.2( appellant no.2) nor the original accused no.3 raised objection before the trial Court regarding misjoinder of charges or mis-joinder of trial; and as such though there is an irregularity in holding joint trial , we hold that it is not a case where trial could have been said to have been vitiated.

28. In the light of the foregoing discussion, we pass the following order:

(i) The appeal of the appellant no.1(the accused no.1)-Dilipsinh N. Vaghela stands dismissed. The judgment and order of conviction and sentence dated 28-9-1990 passed by the Addl. Sessions Judge, Ahmedabad Rural against the appellant no.1 in Sessions Case no.56/90 is hereby confirmed.

(ii) The appeal of the appellant no.2(accused no.2)-Satishkumar Chunilal Sharma is allowed. The judgment and order of conviction and sentence dated



28-9-1990 passed by the Addl. Sessions Judge in Sessions Case no.56/90 against the appellant no.2(the accused no.2) is hereby quashed and set aside. The appellant no.2 is acquitted of all the charges levelled against him. The bail bonds, furnished by and on behalf of the appellant no.2 stands cancelled.

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